on different dates, namely by Encik Mohd. Noor, the officer who succeeded Encik Abdul Murad, on 21st September, 1973, and Encik Wan Abdul Aziz, on 29th January, 1974.

Section 261 of the Criminal Procedure Code provides that whenever any magistrate after having heard and recorded the *whole* or *any part* of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding *may act* on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself. The purpose of this section is to prevent a re-hearing in certain cases where a re-hearing will result in unnecessary hardship or injustice or unreasonable expenditure subject always to the guarantee as provided in proviso (a) that the accused may demand any witnesses to be re-summoned or re-heard.

The present case is a case in point having regard to the large number of witnesses already called and given evidence and the large number of exhibits already tendered. The difficulty in this case is only that a finding of guilt had already been made by the original President and he had also proceeded to record the evidence of the first defence witness; but this difficulty is not insurmountable. Section 325 of the Criminal Procedure Code allows the High Court in its discretion to exercise any of the powers conferred by section 316 of the Criminal Procedure Code. The order of the original President on the finding of guilt is in my view an "order" within the meaning of section 316(c). In the exercise of my revisionary powers I order that the trial of this case be continued under the provision of section 261 of the Criminal Procedure Code on the following terms. To enable that justice may be had the order of calling for the defence made on 20th September, 1972, is set aside; the record of evidence of first defence witness be expunged from the records, and the orders of "trial *de novo*" made on 21st September, 1973 and 29th January, 1974 are set aside.

Order accordingly.

SIVALINGAM v. PUBLIC PROSECUTOR

[O.Cr.J. (Hashim Yeop A. Sani J.) March 25, 1974]
[Seremban — Originating Motion No. 18 of 1974]

Criminal Law and Procedure — Trial — Application for reference of questions to Federal Court — Applicant unsuccessful on appeal — No question of public interest — Courts of Judicature Act, 1964.

In this case the applicant had been convicted for an offence under sections 408 and 477A of the Penal Code. His appeal to the High Court was dismissed. Subsequently he applied to have certain questions referred for determination by the Federal Court.

Held: the questions sought to be referred were not of public interest and therefore the application must be refused.

Case referred to:-

(1) *Tan Yin Yen* v. *Public Prosecutor* [1973] 2 M.L.J. 143.

ORIGINATING MOTION.

J. Nadchatiram for the applicant.

Abu Hashim bin Abu Bakar (Deputy Public Prosecutor) for the respondent.

Hashim Yeop A. Sani J. (delivering oral judgment): This is an application under section 66(1) of the Courts of Judicature Act, 1964, by the appellant in Seremban High Court Criminal Appeal No. 18 of 1972 that certain questions be referred for determination by the Federal Court. The applicant had earlier been convicted under sections 408 and 477A of the Penal Code by the learned President, Sessions Court, Port Dickson. He appealed against both conviction and sentence. At the hearing of the appeal on 16th February, 1974, the conviction and sentence were upheld.

The questions sought to be referred are as follows: —

(1) whether after the prosecution case is closed and during the course of a submission by defence counsel that the prosecution has not made out a case to answer under section 173(f) of the Criminal Procedure Code, the court may order further evidence to be produced?

(2) whether during the course of a submission of "no case" the court may direct the defence to call any witness?

(3) whether when a person is accused of an offence under section 408 of the Penal Code there is any onus or burden on him to explain how he dealt with the money he is alleged to have received?

At the commencement of hearing of the application counsel for the applicant has added the following question as an additional question also sought to be referred: —

(4) whether a criminal trial is a nullity if witnesses are called to give evidence before accused had done so in the light of section 173(j) of the Criminal Procedure Code?

In a proceeding of this nature the guideline for the High Court is given in the judgment of Federal Court in *Tan Yin Yen* v. *Public Prosecutor*[1] which appears in the last paragraph of the judgment as follows: —

"It is to be observed that questions of law which may be referred to us under section 66 should not be questions that are of personal interest only to the accused or the Public Prosecutor, but should be questions that are of *public* interest, and it seems to us better if the High Court were to exercise their discretion under section 66 sparingly, so that the references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court."

It is to be observed from the records of the appeal that questions (2), (3) and (4) were not grounds specifically referred to in the petition of appeal. Question (3) was referred to in the argument of the appeal only in the general context of the main submission that the conviction was against the weight of evidence.

With regard to questions (1) and (2) the position can be cleared by looking at the records of the appeal themselves. There was nothing on record that the learned President himself entertained doubt about the

handwriting. His order was apparently for the purpose of assisting the defence just in case the handwriting expert could give evidence which could create reasonable doubt on the prosecution case. The records at page 53 clearly show that the learned President had already made a finding on the prosecution case before asking the defence to call the expert. In fact it is also recorded at that page that the defence *also* suggested that the expert be called. Defence had in fact been called by the learned President and the applicant was given the three alternatives as recorded at page 53 of the appeal records and it was unnecessary for the learned President to again give the three alternatives to the accused at page 54 of the records after the expert was called. This sequence can clearly be seen at pages 49, 50 and 53 of the records.

Question (4) follows logically in sequence to questions (1) and (2) and this question was neither specifically raised as a ground in the petition of appeal nor argued at all during the hearing of appeal; this question is therefore not a fit and proper one to be referred under section 66 of the Courts of Judicature Act, 1964. At the hearing of the application counsel refers to the word "shall" appearing in the second line of sub-paragraph (j) of section 173 of the Criminal Procedure Code and it is his contention that it is mandatory for the accused to give evidence first in the witness box before any other defence witness is called to testify. Suffice to say that there is no merit in this argument as that paragraph merely sets out the procedure for the accused to state his defence and the requirement does not go beyond that the court shall ask the accused to state his defence. The procedure contended by counsel for the applicant is neither supported by sub-paragraph (j) expressly nor by necessary implication.

With regard to question (3) the finding of the learned President was recorded at page 60 of the records. He made the finding that the defence had failed to cast reasonable doubt on the prosecution story. It is also clear from the records that the matter referred to in question (3) was not the reason for the learned President's finding of guilt. He considered the proven facts and circumstances. From what I can understand from the records what the learned President was asking for was for some explanation as to how the accused dealt with the payment of wages of labourers to explain that the money was in fact paid to the workers if that was the case of the defence because the defence of the accused would seem to be a complete denial. This question cannot be a proper question for reference in the context of the specific finding made by the learned President that the money the subject of the charge was received by the applicant and not merely alleged to have been received.

Although the substance in question (1) was referred to specifically as a ground in the petition of appeal, this question was not material in the decision of the appeal having regard to the evidence recorded by the learned President. The conviction and sentence of the appellant were confirmed because of specific findings by the learned President and they were neither wrong in law nor against the weight of evidence. In my view questions to be referred under section 66(1) of the Courts of Judicature Act, 1964 should not only be questions referred to as grounds in the petition of appeal and pursued in the appeal they must also be questions which are material to the determination of the appeal. Surely it is not the intention of section 66 of the Act to enable a party who loses an appeal to resort to that section and to bring in questions which were neither fully argued at the appeal nor material to the determination of the appeal. In fact section 66(1) is very clear on this where it provides that the High Court may "reserve for the decision of the Federal Court any question of law of public interest which has arisen in the course of the appeal and the determination of which by the judge has affected the event of the appeal."

For these reasons the application is dismissed.

Application dismissed.

Solicitors: *J. Nadchatiram & Co.*

LAW YEE WAH & ANOR. v. POH KOH & SONS REALTY SDN. BHD.

[A.C.J. (Wan Suleiman J.) April 6, 1974]
[Seremban — Civil Appeal No. 8 of 1972]

Practice and Procedure — Appeal — Notice of appeal — Application for extension of time for service — Subordinate Courts Rules, 1950 — Absence of guidance therein — Interpretation Act, 1967, s. 54(2).

Service of a notice of appeal some 25 days after the last day for filing such notice of appeal in court is sufficiently speedy and an application for extension of time for such service is unnecessary.

Cases referred to:-

(1) *Liew Chee Tat* v. *Lok Moon & Ors.* [1972] 2 M.L.J. 29.

(2) *New India Assurance Co. Ltd.* v. *Karam Singh,* Muar Civil Appeal No. 1 of 1970 (unreported).

NOTICE OF MOTION.

J. Nadchatiram for the appellants.

Seah Choon Chye for the respondent.

Wan Suleiman J.: This is an application by way of Notice of Motion filed by the appellants in Seremban Civil Appeal No. 8 of 1972 for an extension of time for service of the Notice of Appeal upon the respondent.

The decision of the Magistrate, Seremban in Magistrate's Court Civil Suit No. 153 of 1971 was pronounced on 29th July, 1972, and Notice of Appeal was filed on the same day, but was not served on respondent's solicitor until 7th September, 1972 when it was accepted under protest, in view of the decision of Sharma J. in *Liew Chee Tat* v. *Lok Moon & Ors.*[1]

In that appeal, Sharma J. referred to an unreported decision of his (Muar Civil Appeal No. 1 of 1970: *The New India Assurance Co. Ltd.* v. *Karam Singh*[2]) in which his Lordship had held that though the notice of appeal was served on the respondents more than 14 days after it had been filed (apparently 14 days after the last day for filing it in court), it had been served on the respondents within a reasonable time. In *Liew*